

To what extent is the EU agency FRONTEX transparent and accountable for its activities?

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ABSTRACT

The purpose of this study is to estimate, to what extent EU-level agency FRONTEX is transparent and accountable. The study is conducted in the legal area, inasmuch as the focus lays on the legal implications of both the concepts. The transparency and the accountability allow to maintain democratic control, increase citizens' trust and encourage active involvement of civil society in the democratic life which are EU policy priorities. The transparency is often intermixed with the accountability, however, both of them contribute to the principle of openness. This contribution is led on the grounds that being transparent is equal to openness and being accountable is equal to responsibility. The essential rules for both the principals at supranational EU-level are examined and applied to EU body – agency FRONTEX. The paper argues that there are the discrepancies between the general EU standards and actual agency's type of acting; it is still much to evolve in the activity to increase its open manner of work, in spite of the fact that post-Lisbon period brought up positive remarkable changes in this aspect. The case of TRITON operation is taken for the illustration of FRONTEX current working. For the examination and further assessment, the qualitative data are used, including the official documents of EU institutions, academic literature and reports from NGOs. The research elucidates, how the transparency and accountability are integrated in the FRONTEX's work and to what extent they are integrated in the present moment.

Key words: EU agency, FRONTEX, transparency, accountability

List of Abbreviations

AFSJ Area of Freedom, Security and Justice

ECHR European Convention on Human Rights

EP European Parliament

EU European Union

FR Fundamental Rights

FRONTEX European Agency for the Management of the Operational Cooperation at the External Borders of the Member States of the European Union

JHA Justice and Home Affairs

JO Joint Operations

MS Member State

NGO Non-governmental organisation

TEU Treaty on the European Union

TFEU Treaty on the Functioning of the European Union

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1. Introduction

The principles of transparency and accountability gain popularity in the political discourse of EU. These principles are promoted as the main drivers for the effective and progressive governance at EU level. The open law-making in EU becomes a central purpose of the EU administration¹.

The White Paper on Governance² represents the first sign in the embodiment of the required values of openness and responsibility in the model of governance at the supranational level in EU. In 2015, the White Paper still remains fundamental but not the only one document, playing the specific role in the formation of the transparent and accountable political and legal context. The penetration of these principles relates to the diverse areas of the EU machinery.

This research examines the realization of the transparency and accountability into the practices of EU agencies, particularly, of FRONTEX. The European Agency for the Management of the Operational Cooperation at the External Borders of the Member States of the European Union, commonly known as FRONTEX, was founded in 2004 by the Regulation (EC) 2007/2004. This agency, based in Warsaw, has an ambiguous reputation and it is often criticized for the lack of transparency and low accountability, especially when it concerns the protection of fundamental rights; in particular, the lack of transparency and accountability of the agency has emerged in relation to its operational activities (Carrera S., 2013, Marin L., 2011, Leonard S., 2009, Vara J. S., 2015). The agency acts in a very sensitive area of external borders of the EU, intended to be used in the solution of migration issues. It undertakes the initiative and demonstrates the commitment to respect of fundamental rights, enshrined on the legal level³. Yet, the agency is often evaluated not positively in the respect of transparency and accountability⁴. The private citizens have the access to the reports from FRONTEX website, describing the operations, but not to all the reports or not in the full versions; the agency regulates itself the quantity and the quality of the given information; the responsibility for the consequences of the actions of the organization seems limited or shadowy, denoting the legal ambiguities.

This study proceeds as follows. Firstly, the methodological approach is described (chapter 2). Secondly, the concepts of transparency and accountability are introduced and explained (chapter 3). Thirdly, the existing rules and standards in relation to transparency and accountability principles in EU are examined (chapter 4). Fourthly, these rules are applied to FRONTEX as EU agency and the consistencies or inconsistencies are pointed out (chapter 5). Finally, FRONTEX's operation at the sea is selected in order to illustrate the application in

¹ <http://www.ombudsman.europa.eu/en/press/release/faces/en/59975/html.bookmark>.

² COM (2001) 428 European Governance . White Paper, Brussels - 25.07.2001.

³ Regulation 2011

⁴ Human Rights Watch. (2011). *EU's dirty hands*. London.

practice, how it actually works (chapter 6). Afterwards concluding remarks are made about the actual work of the agency in terms of transparency and accountability, including the possible recommendations for further development of the principles in the agency (chapter 7).

2. Methodology

The chapter demonstrates the approach, which is used in this research: the research question is formulated, the research design, the case selection and the data collection are described.

2.1. Research Question

Transparency represents a quite broad notion without clear indicators, which is used in a number of different disciplines (economics, politics, law etc.). The interpretation of accountability remains also problematic due to the complexity of the concept. There is no single definition, appropriate for all the areas, as well as there is no unified system of transparency and accountability estimate. The review of academic literature (Bovens, Busuioac, Cucciniello, dictionaries) results in the evidence that accountability and transparency are put in the interchangeable position; as a result, this interchange engenders the confusion between two originally different concepts. The point, where the transparency finishes and where the accountability starts, blurs out. The importance of both the concepts in the legal discourse has impact on the formulation of our general research question:

To what extent is the EU agency FRONTEX transparent and accountable for its activities?

The research question is explorative and the aim of the research is to estimate the transparency and accountability of FRONTEX in the present moment. The following subquestions may serve as the directional lines of the thesis:

- 1) What is the general understanding of the principles of accountability and transparency in public administration?*
- 2) How are the principles of transparency and accountability regulated within EU legal system?*
- 3) To what extent does the EU agency FRONTEX abide the principles of transparency and accountability?*
- 4) To what extent are the principles of transparency and accountability respected by the EU agency FRONTEX?*

2.2. Research Design

The study is qualitative given that we use the qualitative data, i.e. the data that are not reflected in counts and numbers. This is an explorative research, so far as we develop the topic of transparency and accountability in relation to the institutional agency in EU. The aim of the study is to attain a better understanding of openness of FRONTEX from the legal perspective. Transparency is a rather new concept, notably in the framework of the governance. Accountability is usually coupled with transparency. The unit of analysis is defined as “what being studied” (Babbie, 2007). In this research the unit of analysis is the organization, i.e. FRONTEX owing to the final objective to evaluate the degree of agency’s accountability and transparency. The research is limited in sense that concluding remarks about FRONTEX cannot relate in the same degree to other EU agencies, even those that belong to JHA, because of the unique role of the organization on the EU policy terrain. The narrative has predominantly the legal character; with thin is mind the focus is on the legal and political context.

2.3. Case selection and data collection

The most amount of resources that FRONTEX possesses are spread in the operations it leads. NGOs put their focus particularly on the operations, while assessing the agency, noting the violation of the fundamental rights⁵. It is intended to select one of the last operations of FRONTEX in the role of the case for the demonstration of lack of transparency and accountability in practice. The selected case cannot be earlier than 2011 for the reason that we would like to judge the current situation in the organization and the last amendment of Regulation was implemented in 2011. Furthermore, in 2013 EUROSUR entered into force, influencing on the collaboration between FRONTEX and MSs and the exchange of information between them. This change narrows the choice of time period of the operation. There will be an analysis of an operation, carried out by FRONTEX together with MSs, since the operations have a lack of accessible details and this evidence raises worries about the legitimacy of the agency’s function. Mostly, these controversies relate to the infringement of the fundamental rights. The Charter of Fundamental Rights is legally binding, subsequently, the infringement may have legal consequences, for this reason it is in interest of the agency to hide the “unnecessary” details under the guise of secrecy. Thus, the study of an operation is a perfect demonstration of the real work of the agency in the terms of transparency and level of its accountability.

For this study, the different sources of data are essential. Mainly the data are qualitative. For the theoretical background, there is a review of the academic literature, which provides the perception of the transparency and corollary concepts. The primary and secondary data are considered in the collection, when analyzing the activity of FRONTEX and openness of its activity. The official documents presented by European Commission, European Parliament, Council, FRONTEX and other EU institutions are studied in order to point

⁵ See: reports made by Human Rights Watch, Statewatch, Migreeurop and others.

out the existing standards and procedures as well their implications. The data are complemented by mass media sources and NGOs contributions in relation to transparency and accountability of the organization.

3. Theoretical framework

This chapter provides the theoretical framework of the study, dealing with the concepts of transparency and accountability that are further assessed in application to the EU legal system and the EU agency FRONTEX.

3.1. Concept of Transparency

The concept of transparency is arguable as there is not only one definition of it: what constitutes transparency, what are its dimensions and how to measure it remains unclear even in the academic discourse. Both the conceptualization and the operationalization represent complexity; these unelaborated aspects make extremely complicated any estimation of the degree of transparency at any micro- or macro-level as well in any field, whether it pertains to the economic field, to social field, to political field or another one. The area of application of transparency determines the appropriate type of semantic confusion of the transparency with other corollary concepts.

If to address the EU thesaurus of EU law terms Eurovoc⁶, it will be found that transparency is linked merely to the decision-making and understood primarily as administrative transparency. In the global sense being transparent means being open, not hiding the facts (both intentionally and unintentionally), being accessible, being clear and accurate what is opposite to the notation of secrecy and opaqueness. The transparency is promoted as democratic value, having impact on citizens' trust. Stiglitz (1999) introduces the perception of transparency as a “modus vivendi” for the democratic society and the requirement for the “instrumental grounds” must be fulfilled to achieve greater degree of the transparency. D. Curtin (2014) discusses another side of the coin – secrecy – and offers its view of the balance between the secrecy and transparency in relation to the democratic deficit. The idea of transparency contributes significantly to the model of so-called “good governance”⁷. While reflecting on transparency in the political field, we may come to the remark that being transparent in terms of administration means in the long- run being monitored and controlled effectively. The transparency serves as a means of better monitoring coupled with better governance (Cucciniello et al., 2012:2452).

The key variable of the transparency is information, due to the fact, that transparency is expressed by sharing information on the works of a public body. This is a reason, why from the perspective of public law transparency is measured mainly but not exclusively by the access to the documents (Cucciniello et al., 2012). Along with the availability of information per se, the quality and quantity of provided information also relate to value of transparency; information should be accurate, easily understandable and reliable.

⁶ eurovoc.europa.eu

⁷ COM (2001) 428 European Governance. White Paper, Brussels - 25.07.2001

Mostly the way to assess the degree of transparency goes in two categories: very strong or not at all (non-transparency) (i.e. Schnackenberg, 2009). However, the strongest degree of transparency is visionary by reason of the very core of the concept. In the field of state security, the high degree of transparency is more challenging than in other administrative fields. In fact, the major indicators for the transparency can be judged only in terms “yes” or no”, demonstrating the presence or absence of transparency at all. Thus, the measurement of transparency is elusive and complex (Hollyer et al., 2014) and there is a gap between two polarities. In this study, the main components of transparency contribute to the access to EU documents and to the transparent procedures of EU agency. Transparency is considered in the sense of access of documents, or “freedom of information”. The definition by A. Meijer (2013:430) is taken, where transparency means “availability of information about an actor that allows other actors to monitor the workings or performance of the first actor.” Given the reality that it is possible to evaluate the extent of transparency only in terms of presence or absence, the conclusion is expected to be in these terms as well.

3.2. Concept of Accountability

Unlike transparency, accountability is frequently used by law scholars, since the concept of accountability contains the component of openness, however, not exclusively. In the law dictionary, one may find such a definition of accountability: “when one party must report its activities and take responsibility for them. It is done to keep them honest and responsible.” In the EU thesaurus, accountability is not clarified at all. The clear legal explanation of the accountability lacks either in general or in application to EU agencies. Moreover, the transparency concept from legal point of view is embodied in the academic sources more in the form of accountability. Concerning accountability, it is often interchanged not only with the transparency but the control as well (Busuioc, 2009). The accountability matters because it is a significant tool to monitor and to control and it enhances the democratic legitimacy. The accountability includes not only the information stage, but also the answer about the activities and the justification of the activities in the case of need (Bovens, 2007). While discussing the accountability of FRONTEX, it will be examined its accountability through looking to whom, for what and how it is accountable (Bovens, 2007).

The concept of accountability is not less vague than the concept of transparency. The requirement for the accountability is expressed in the political document White Paper on Governance⁸: “*Each of the EU institutions must **explain and take responsibility** for what it does in Europe.*” This wording may be spread over the activities EU agencies as well. The clarification of undertaken actions and bearing responsibility constitute the accountability, expressed in different forms (political, financial, legal, administrative etc.⁹). It is confirmed

⁸ COM (2001) 428 European Governance . White Paper, Brussels - 25.07.2001.

⁹In the academic sources there are different kinds of accountability that could be met but there is no one system of accountability types. Usually, in all the sources political, legal, financial, administrative aspects are mentioned. Also there is often speech about ex-ante and ex-post accountability.

by the definition provided by M. Bovens, which serves an orientation in further paper analysis: “*relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor might face consequences*” (Bovens 2007: 450). This definition emphasizes also the significance of the explanation process and the possibility of consequences for the actor. The trouble emerges, when we reveal that in general EU agencies are supposed to be the independent organizations despite their participation in EU policy measures and in the same time they should be effectively controlled and monitored to be legitimate, i.e. they should act openly (meaning “transparently”) and should be responsible (meaning “being accountable”). In the research the core is the legal aspect, therefore the central points of accountability are also legal or at least political. EU agencies are the separate legal bodies with the considerable autonomy and for that reason, the political accountability is more appropriate than legal, for instance.

3.3. Conclusion

This chapter clarifies how transparency and accountability may be applied and defined in the sphere of EU law. The understanding of both the concepts allows the further assessment of the incorporation of these principles into EU legal framework. Transparency represents predominantly access to documents and reliable, understandable, disclosed information. Accountability replaces to much extent responsibility, i.e. to whom, how and in what form the examined body is responsible. Transparency and the accountability are linked closely to the control and monitoring and, as a result, have impact on the efficient work of the organizations. Simultaneously, control cannot be serious, due to the lack of adequate tools implied for the EU agencies as independent bodies. The aspect of independence of EU agencies will be examined in a more detailed way in the chapter 5.

4. The Rules and Standards of the EU about Transparency and Accountability

This chapter provides a general overview of the legal background for the principles of the transparency and accountability at the EU level, including treaties and soft law.

4.1. Treaties

The principles of accountability and transparency are enshrined in primary law; the essential element of transparency on the law level is the access to documents and dissemination of information. The first article of TEU (Article 1(2)) invokes openness with regard to the decision-making process in Europe, in consequence of which the unity of citizens consolidates. The article indicates that the union between the Europeans becomes closer in case if the decisions in EU are made **openly** and **closely to** the public as much as it is possible. The concept of openness is introduced by the Maastricht Treaty in the legal EU world with the final goal of maximal closeness to the citizens. Article 10(3) TEU confirms this value, connecting it with the participation of each citizen in the democratic life and establishing the interrelation of transparency and democracy. Article 11(2) TEU outlines the transparent and open character of dialogue between the institutions and civil society. The wording “as openly as possible” reappears in the articles of TFEU (i.e. Article 15), suggesting all and nothing in the same time without any details about the legal meaning of the term: its definition, its criteria, its manifestations; the highest degree of openness is unspecified. Article 15(3) TFEU provides the access for all the EU citizens and Union’s residents to the documentation of all the EU institutions:

“Each institution, body, office or **agency** shall ensure that its proceedings are **transparent** and shall elaborate in its own Rules of Procedure specific provisions regarding **access to its documents**, in accordance with the regulations referred to in the second subparagraph.”

Article 15 stipulates “open work” as a necessity for good governance and to ensure access to information of any citizen as well as for any natural or legal person in EU. Additionally, it is the own responsibility of the institutions, agencies, bodies, or offices of the EU to comply with the transparency principle in their activities. Moreover, Article 16 TFEU provides the right for the personal data protection.

As we mostly interpret the wording “open” in EU law as a synonym of “transparent” to some extent, Article 298 (1) TFEU confirms the extension of the transparency principle to the whole system of EU administration: “In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.”

4.2. Other Legal Sources of transparency and accountability under EU law

Secondly, other EU legal sources are addressed in order to have a clearer understanding of the meaning of transparency and accountability from a legal perspective.

4.2.1. Regulation 1049/2001/EC

Regulation 1049/2001/EC, regarding the public access to the documents of European Parliament, Council and Commission, is another important legal source of the principle of transparency. The document was adopted 30 May 2001 with the aim “to enshrine the concept of openness” (recital 1). After the Treaty of Lisbon came into force in 2009, the public access was extended to the administrative documents of all the EU institutions, bodies, agencies and offices from the initial point of access to the EP, Commission and Council documents. Regulation 1049/2001/EC demonstrates explicitly the link between openness and greater legitimacy, accountability, effectiveness of the administration, coupled with a significant contribution to respect of fundamental rights and principles of democracy (recital 2). It manages inter alia access to documents, “relating to foreign and security policy and to police and judicial cooperation in criminal matters” (recital 7). Article 1 clarifies the purpose of Regulation 1049/2001/EC: “a) to define principles, conditions and limits...governing the right of access...to ensure the **widest** possible access to documents; b) to establish rules ensuring the easiest possible exercise of this right; c) to promote good administrative practice on access to documents.” The parties have the right to request the particular information without explanation of reasons (Article 6). Besides that, there are exceptions, when the public access can be refused and these cases include the protection of public security, defence and military matters what seems crucial to our topic as it is related directly to the activities of FRONTEX, acting in security field¹⁰. It should be noted that Regulation 1049/2001/EC handles with the access to documents but not to the provision of information as a whole, although the definition of the document is rather broad: “any content whatever its medium (written on paper or stored in electronic form or as a sound. Visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility” (Article 3 (a) Regulation 1049/2001/EC).

4.2.2. The White Paper on European Governance and Green Paper European Transparency Initiative

The White Paper on European Governance was produced by the Commission in 2001¹¹. It represents a political stage in the evolution of the transparency and accountability principles. The Commission undertakes the active participation in the development of governance and names five basic principles of the good governance – openness, participation, accountability, effectiveness and coherence. All these principles are expected to help the EU to attain its democratic objectives. However, the Paper neither reveals any criteria for the openness nor a precise definition; this uncertainty complicates the application of the principle in practical

¹⁰ Article 4 Regulation 1049/2001/EC

¹¹ COM (2001) 428 European Governance. White Paper, Brussels, 25.07.2001

terms. It is still remarked that openness implicates the “**open manner**” of EU institutions’ work, the clear **communication** about the decisions and the **accessible** language (p.8). Accountability means the explanation and taking **responsibility** by EU institutions (p.8), herewith the light is not shed on the consisting parts of possible consequences, when this or another actor is responsible.

After the publication of the White Paper, the concept of transparency and accountability continued to evolve and penetrate EU policies. In 2006, the Green Paper¹² appears, issued again by Commission, and it highlights the significance of transparency in connection with the legitimate modern administration. The paper stresses the importance of accountability in the conduct of organization, since it has a willingness to contribute to European policy development (p.7).

4.2.3. EU Charter of Fundamental Rights and the European Convention on Human Rights

Fundamental rights and freedoms constitute general principles of EU law (Article 6(3) TEU). The values of respect for human rights are also solidified in Article 2 TEU. The EU Charter of Fundamental Rights and European Convention on Human Rights are two legal documents that regulate the area of protection of fundamental rights. Information represents the natural value and each person should have right for it; the provisions for information are considerable for this paper for the reason that information is a core of transparency. With the entry of Lisbon Treaty into force in 2009, EU Charter of Fundamental Rights becomes legally binding for all the MSs and EU bodies, including FRONTEX. Its legal value is recognized to be equal to the legal value of Treaties (Article 6(1) TEU). The *fundamental* right of access to documents is codified in Article 42 of the EU Charter: “Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.”¹³ The limitations to this right must comply with Article 52 of the EU Charter, indicating that the right is exercised within the framework of founding EU treaties. Yet there are no mentioned exceptions to this right in comparison with the Regulation 1049/2001/EC, which has provision for a number of exceptions¹⁴.

The European Convention on Human Rights serves also a critical legal instrument. Article 10(1) ECHR includes the freedom to receive and impart the information and ideas; it outsteps the limits of the documents, still comprising the access to data¹⁵. By other words, it complements Regulation 1049/2001/EC that concerns exclusively the aspect of available documents.

¹² European Commission. European Transparency Initiative. Green Paper, Brussels – 03.05.2006. COM (2006) 194.

¹³ *Charter of Fundamental Rights of the European Union (2000/C 364/01)*. Brussels: European Union. OJ (364/1), 18.12.2000.

¹⁴ Article 4 Regulation 1049/2001/EC

¹⁵ <http://strasbourgobservers.com/2013/07/08/article-10-of-the-convention-includes-the-right-of-access-to-data-held-by-intelligence-agency/>

4.2.4. Transparency Register

The initiative with the special legal basis, concerning the transparency, is the Transparency Register managed by the Joint Transparency Register Secretariat. The Joint Transparency Register Secretariat (further, JTRS) consists of officials from European Parliament and the Commission. JTRS is multi-functional: officials manage the Register daily, answer the questions, work with the complaints, improve the data quality¹⁶. The registration system is on voluntary basis. The legal basis for the initiative is determined by the interinstitutional agreement between the European Parliament and the European Commission firstly signed in 2011 and revised in April 2014. In the light of the above, it is prominent that not only Commission, but EP as well plays a role of a leader in developing the standards of transparency and accountability. In the description of the initiative it comes out that transparency is in the interchangeable position with the word “open” and it signifies a crucial factor to impact on the citizens to involve them in the democratic activities of EU as well as to keep in balance the representation, to minimize the cases of the pressure and “illegitimated or privileged access to information or to decision-makers”¹⁷. The rules of this procedure are elaborated by the European Commission and the European Parliament, which collaborate actively in the direction of the implementation of transparency into practice.

The European Commission initiated the transparency portal in 2012¹⁸. The website provides the information about how and by whom the decisions are made in EU. Moreover, anyone (at least as it is stated) can get access to the documents, concerning the drafting and adopting laws; to public consultations; to know, who gets the funding from EU budget.

The European Parliament supported the idea by the creation of transparency and ethics website in 2013¹⁹. It provides access to the documents of EP. In the name of the portal, the clear link of transparency and ethics is discovered. This affinity imposes the cultural value to transparency and incorporation of this cultural value into the whole range of European values, on which EU insists to be based. European Parliament demonstrates the high interest to the concern of transparency, while announcing that it acts with the aim to give support to its electorate represented by EU citizens. The EP funded the electronic register of documents that offers the most of documents since 2001 with the exceptions, based on the article 4 of Regulation 1049/2001 EC.

¹⁶ http://ec.europa.eu/transparencyregister/public/staticPage/displayStaticPage.do?reference=CONTACT_US&locale=en

¹⁷ <http://ec.europa.eu/transparencyregister/public/homePage.do>

¹⁸ http://ec.europa.eu/transparency/index_en.htm

¹⁹ <http://www.europarl.europa.eu/aboutparliament/en/0060f4f133/Ethics-and-transparency.html>

4.3. Conclusion

The principles of transparency and accountability within EU legal system are growing in strength subsequently, particularly in the last decades. The overview of the general rules manifests that the transparency and accountability concepts evolve and become more developed in the legal framework. The legal sources highlight the importance of openness one way or another; openness, accountability, transparency and access to documents usually appear in the same context and promote the modern efficient administrative practice. Nevertheless, the legal background is rather weak to permit an extensive invasion of the “open” values and most of measures do have a voluntary basis. Besides that, the interpretation of the transparency and accountability principles are not always clearly defined or even undefined at all as well as the scheme of the tools, including legal, which would enable transparency and accountability, lacks. In the meanwhile, the political area draws the increasing attention to the productive governance and the transparent decision-making process in the EU, thuswise it is reasonable to suggest that the more substantial incorporation of law transparency and accountability principles is a matter of time.

5. Application of Rules and Standards of Transparency and Accountability to FRONTEX

After the examination of the main existing rules and standards at the EU level that influence the creation, promotion and development of the transparency and accountability principles, EU agencies and, particularly, FRONTEX is addressed. In the following chapter, it will be scrutinized, how both the principals are enshrined in the legal basis of the organization. The chapter is divided into few sections. In the first section, the common features of EU agencies are introduced; in the second section, the institution of FRONTEX is briefly described with the focus on its structure along with the range of its mission and tasks. In the third section, the enshrinement of transparency and accountability from legal point of view is presented.

5.1. Common features of EU agencies

EU agencies are one of the policy instruments of EU, used as a rescue response to the legitimacy crisis (Wolff & Schout, 2013:308). They are autonomous self-sufficient institutions, which possess internal legal personality and function on their own, deprived of international legal status (Vara: 2015). They may exist temporarily because originally they are created for an uncertain period of time. All the EU agencies are headed by the director, who supervises the activities of the organization. In each agency administration is executed by a management board that consists of Commission and MS representatives. The agencies function through the committees. All the EU agencies are obliged to give reports of different kinds about their activities but the recipients of the reports differ from one agency to another without obvious causes. The quality of the provided reports is not subject to the explicit criteria except of the most abstract requirements for availability. The founding regulations of the agencies regulate their activities.

Transparency and accountability of EU agencies became a challenging topic and it may be observed through the activities of EU institutions, producing documents on this theme. Thus, in 2012 the common approach on EU decentralized agencies was elaborated by the Commission; it has summarized the list of actions in the framework of the common approach. It is the first political agreement between the Council, the Commission and European Parliament on EU decentralized agencies. The objectives of this agreement are more balanced governance, **transparency**, higher efficiency, accountability, and greater coherence. However, in this agreement the detail that EU agencies **do not represent EU** is outlined (p.2)²⁰. The contradiction between the establishment of the agencies under EU law and in the same time detachment of the agencies from EU engenders the question : how can be something transparent and accountable if a priori it does not depend legally on other EU institutions. M. Busuioc insists that the legal separation of EU agencies does not cause and cannot be equal

²⁰ Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies (19 Jul. 2012).

to the independence from the EU institutions (2009:604). The Commission, European Parliament and the Council anyway take part into the activities of EU agencies, though their participation does not influence significantly on the results of agencies' activities.

FRONTEX belongs to this range of the so-called decentralized agencies, created for an undetermined period of time within the framework of the Area of Freedom, Security and Justice (AFSJ). The crucial point of AFSJ agencies concern their collaboration with third states and international organizations. The original purpose of the decentralized agencies lays in the help directed to the making and implementation of EU policies. The possible tasks of the decentralized agencies subdivide into three categories: managerial, scientific and technical. This type of agencies contributes too to the cooperation between EU and member-states governments. Consequently, EU agency is the body that functions in the limited area to solve "narrow" critical problems. Within JHA apart from FRONTEX there are four agencies EASO, EUROPOL, CEPOL and Eurojust. Besides that, the agencies FRA and EIGI relate to AFSJ. J. Rijpma (2014) mentions the distinctive role of Europol, EASO, FRONTEX and Eurojust in the coordination of MS operational activities and notes the improvement of accountability mechanisms of these JHA agencies in the post-Lisbon period. The increasing respect for fundamental rights expressed in the case of FRONTEX in the addition of new points in the FRONTEX Regulation has a positive effect on the democratic scrutiny.

In the next sections, FRONTEX agency will be presented in the more detailed way together with the application of transparency and accountability rules to it.

5.2. Creation, tasks and structure of FRONTEX

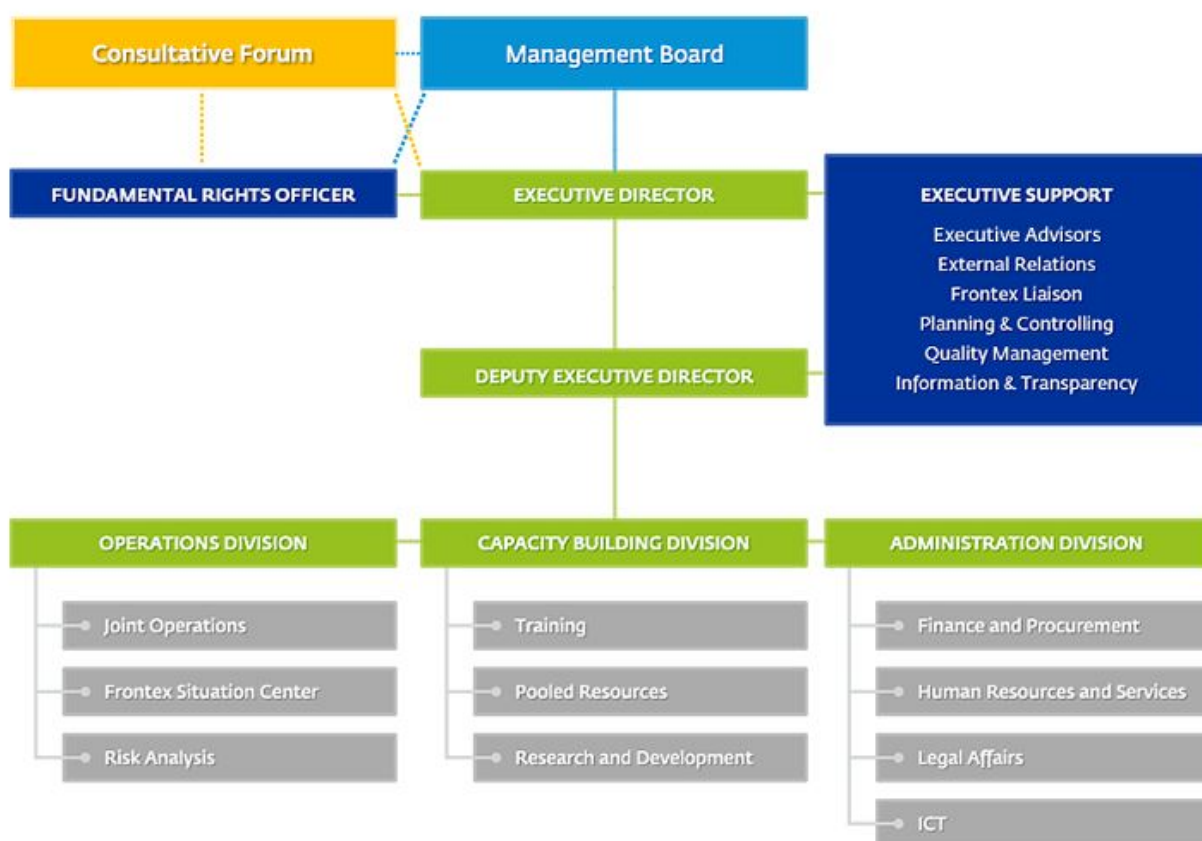
The European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union was founded 26 October 2004 on the basis of Council Regulation (EC) No 2007/2004. The legal basis for the FRONTEX Regulation was Article 66 TEC. In 2011 FRONTEX Regulation was reviewed (Regulation 1168/2011) and the legal mandate was expanded with amendment, containing major transformations of the organization structure (for instance, introducing of the consultative forum and fundamental rights officer). The main responsibility for the control and surveillance of the external border lies on the Member States (article 1(2) FRONTEX Regulation 2007/2004). Besides that, the agency is independent in its technical matters and recognized to have "legal, administrative and financial autonomy" (FRONTEX Regulation 2007/2004). The scope of FRONTEX activities resolves itself into promotion, coordination and development of European border management without the aim of replacement of national border security but with the aim of assistance and complementation. Hence, the agency tries to keep balance between intergovernmental level (dominant role of MSs) and supranational level (outlined role of Commission). Meanwhile there is no legal precision, how the role of coordinator is defined in legal terms and to what extent the coordinator may execute power without abuse of it. The defined operational areas of FRONTEX, indicated in the Regulation 1168/2011, are: 1) joint operations 2) training of officials 3) risk analysis 4) research 5)

provision of the rapid response capability 6) assisting member states in joint return operations 7) information systems and information sharing environment. FRONTEX cooperates with EU third parties such as EUROPOL, EASO, Eurojust, FRA or CEPOL. It also works closely with customs authorities and border-authorities of non-EU\Schengen countries. Formally, any responsibility for FRONTEX actions mostly lies on Member States, what gives an illusion of the priority of national legal systems, although as EU agency, subject to EU law, FRONTEX cannot be fully detached from EU competences.

The current structure of FRONTEX is presented on the table below.

Table 1: Structure of FRONTEX.

STRUCTURE



Source: <http://frontex.europa.eu/about-frontex/organisation/structure/>

The table uncurtains the resemblance of the FRONTEX structure to other EU agencies, however, not in all the parts. There are management board and the consultative forum. In the structure three divisions exist -

capacity building, operations and administration division. The consultative forum, unifying the representatives of the diverse civil organizations (FRA, EASO, UNHCR etc.), is headed by the fundamental rights officer and introduced relatively recently in 2011. The Fundamental Rights officer, independent in its duties, should observe the organizations' activity and report about it to the forum and Management board. At a first glance, the structure looks well rationalized and promises efficiency.

In the following section, the transparency and accountability of FRONTEX from law viewpoint are analyzed. Herebelow it will be demonstrated, how deeply these principles are incorporated in the organization's activities.

5.3. Analysis of law transparency and accountability of FRONTEX

The primary source for analysing both the concepts in relation to the agency is represented by FRONTEX Regulation, which has been amended few times until now. In the present moment, the agency acts under the prescription of FRONTEX Regulation No 1168/2011. FRONTEX's activity is built upon the legal base provided by Articles 74 and 77 (2) points (b) and (d) of TFEU. The initial Regulation No 2007/2004 include the first chapter about subject matter, the second chapter about agency's tasks, the third chapter about the structure, the fourth chapter linked to the financial requirements and the final provisions in the fifth chapter. The current Regulation No 1168/2011 amends some articles of the initial Regulation and inserts new articles, for instance, in relation to code of conduct, organisational aspects of joint operations and pilot projects, composition of European border guard teams, data protection and fundamental rights strategy. The strong accent shifted not only to the fundamental rights strategy but also to more powers in the area of joint operations (JO). In the amended Regulation 2011 Article 11 about the personal data in the context of operations and interventions is developed much more in comparison with the initial Regulation. It strengthens the cooperation with EUROPOL and other relevant EU agencies during processing the personal data, allowing to control more effectively the cross-border criminal matters, and human trafficking. Next Articles 13 and 14 are extended, increasing the involvement of other actors and placing more focus on international law area.

Furthermore, FRONTEX Regulation is examined from different angles in order to apply transparency and accountability concepts. The section is organized through the outline of the diverse aspects that Regulation controls.

5.3.1. Interaction with EU actors

In this section, the interaction of the agency with other EU institutions is examined. The Commission and the Member States are the essential actors, indicated in the Regulation, who are invoked with the aim to control effectively the functions of the organization, i.e. to whom FRONTEX should be accountable. The current

management board is composed of the heads of the border authorities of the 26 Member states, plus two members of the Commission. The representatives of UK and Ireland are invited to the meetings as well as countries associated with Schengen *acquis* Iceland, Norway, Switzerland and Lichtenstein. The board is entrusted with the power to develop the transparency of the decision-making procedures. Each year it should produce the general report of the agency available for the public and for EP, Commission, Council, Court of Auditors and European Economic and Social Committee (art.20)²¹. Annually the work programme is firstly approved by the Commission and then directed to EP, Commission and Council, thus the opinion of Commission has a significant impact. The Commission enables all the important changes such as adoption of the basic documents, budget verification, ensuring the transparency in the activities and even the executive manager is appointed by Commission.

The Council and the European Parliament are absent in the composition of the management board, although the Council plays a particular role, while developing policy and legislation on external border control and surveillance. The unanimity of Council determined the seat of the agency²². Relating to the powers of European Parliament, its participation is rather limited in supervising the activities of FRONTEX (Trauner, 2012). It may ask FRONTEX's officials to report about their activities, but in non-obligatory way (Perkowski, 2012). EP does not require compulsory meetings with the Executive Director (article 25(2) Frontex Regulation) and EP members do not participate in the Management Board. Thanks to the efforts of the European Ombudsman, 30th of June 2015 the FRONTEX hearing in the European Parliament was after all organized, and this indicates the possibility of other EU actors to improve the monitoring and control of the agency. EP does not have access to general and tailored risk analyses (although they are available for the Council and the Commission), whilst the general reports and the work programme are accessible. All these factors determine the low degree of parliamentary control. In the meanwhile, Parliament, which enabled the establishment of consultative forum and FR officer, is obligatory informed about the fundamental rights activities, agreements with third parties and about MS contributions to FRONTEX operations. The European Parliament has more powers in the budgetary respect; it goes in line with its general activity in EU. The more active involvement of the European Parliament into FRONTEX's activities could increase accountability, all the more so as it participates in the transparency initiatives as well as it has a great impact in the general boosting of the openness, including the area of EU law²³. Gradually the Commission and the Council have dominant influence, for the period that EP makes a slow progress in this direction. It is worth to consider that EP may support substantially transparency and accountability of the agency for the reason that it is closer to private citizens than Council and Commission.

²¹ Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (O.J. L 349, 25.11.2004).

²² Article 15 FRONTEX Regulation No 2007/2004.

²³ <http://statewatch.org/news/2015/mar/green-efa-ensuring-utmost-transparency-Piana-Oberg-Korff.pdf>

The judicial aspect reflects the role of ECJ in the activities of the agency. The demand for the judicial review is recognized a significant factor of the accountability for to the agencies would not go beyond their powers (Busuioc, 2010). Before Lisbon Treaty (2009) ECJ did not possess the power to execute the judicial review over the agencies but article 263 TFEU comprises the statement: “It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-a-vis third parties.”

5.3.2 Management

The managerial aspect reflects the state of transparency and accountability in the administration. As it has already been mentioned, the executive director rules the management board. The executive director is vested with the right for its own independent decisions, helped by the deputy executive director.

The executive director receives the detailed annual report from the specialized branches about their activities and other relevant information²⁴. The executive director is completely independent in its duties and both Council and EP only may invite him to report about his activity, notwithstanding his task to prepare and execute all the decisions and programmes of the management board. In the light of these facts, he possess the great ruling power without the obligation to be accountable for exercising the power²⁵. Once a year he prepares a draft working programme and activity report. He is exclusively accountable to the Management Board, i.e. mainly to the MS. The Management board appoints and decides to dismiss the executive director in case of need, thus strengthening the dependence on MS, in spite of the fact that the candidate for the office is offered by the Commission but the last word, or vote is after the overwhelming majority of MS. The executive director is also entitled to suspend or finish the operation in the case of fundamental rights (FR) violations. Whether the director estimates the event as violation or not, it is not clear on which grounds he could have such a judgement.

The amended FRONTEX Regulation 2011 evolved substantially the aspect of respect of FR by introducing the FR organizations into activities, creation of the forum and appointment of FR officer. However, the function of the forum and FR officer has an advisory character and does not have the force to constrain to necessary actions. The instrument for FR department to fight against the disclosed infringements is not enshrined in the 2011 Regulation, engendering doubts in the real power and effectiveness of the forum and FR officer.

The absence of non-EU actors who are left aside of the management Board, therefore, of participation in decision-making, may influence negatively on the openness of the organization because certainly last years the activities of FRONTEX, including the legal aspect, have shifted more to the foreign affairs terrain. FRONTEX has to do with two conventional polarities: security of EU citizens and security of third country

²⁴ Article 16 FRONTEX Regulation No 2007/2004.

²⁵ Article 25 FRONTEX Regulation No 2007/2004.

nationals, but EU citizens have an obvious priority in this case, while third country migrants remain in the vulnerable group. In addition, third countries representatives are not even envisaged to be a part of the decision-making process, yet FRONTEX is created to interact with the third countries. It is possible for FRONTEX to conclude working arrangement that cannot be equal by their legal force to the international agreements. Merely not legally binding tools induct the third countries into agency's work. The details of working arrangements are not accessible for the public.

5.3.3. Access to documents, quality of information and transparent decision-making

This subsection deals purely with the transparency concept in FRONTEX activity. As mentioned above in the chapter 3, transparency on the law level is estimated through access to documents and the quality of information. Concerning access to documents, FRONTEX should comply with the Regulation EC No 1049/2001 (FRONTEX Regulation) that covers all kinds of documents, including sensitive documents, but does not regulate the provision of information as a whole. FRONTEX must also act in conformity with the Charter of Fundamental Rights that emphasizes the right of access to document amongst other things. In addition, the agency announces its readiness to give rapidly objective, reliable and understandable information (the criteria, how the information is evaluated, are obscure). In practice, the access to documents is executed but in a limited "version". For one who would assess the quality of the given information, it would be a tough task because FRONTEX produces such an amount of information, which it considers sufficient. It is hard to determine the extent of reliability of information. If to estimate only the access to documents, the full risk assessments, the operational agreements, the working arrangements with third countries and organizations are not available for the public. EU considers that agencies are themselves responsible for the promotion of access of documents and good administrative practice for it (see Regulation No 1049/2001/EC) but FRONTEX does not hurry to imply it.

Furthermore, Article 33 FRONTEX Regulation 2011 regulates the evaluation mechanism but represents rather short information on it and demonstrates the low degree of elaboration. It is stated that the independent evaluation will be implemented externally and the Management Board will get it, hereafter the Commission and the Council take part in the process and the new action plan is represented. The outcome of the evaluation and recommendations become available for the public, however, the further development of the recommendations remains under question. Regulation 2011 introduced the specific analysis over the FR in the evaluation, however, transparency and accountability are not outlined specifically in this evaluation, although FRONTEX is evaluated negatively not only because of infringements of FR but because of lack of transparency as well.

Amongst the different actions, implemented in order to increase transparency of the organization, the thorough elaboration and insert of Article 26(a) (2) in the Regulation 2011 is named on the agency's website. FRONTEX invites indeed the range of organizations, capable to promote the fundamental rights and ensure

higher rates of transparency.²⁶ Nevertheless, the principles for the choice of this or another organization are not prescribed. It is only known that partly the organizations are invited by Management Board and partly by Drafting Committee. Thus, the organizations with the tough critique of the FRONTEX activities – Human Rights watch, Migreurop and Statewatch do not participate in the consultative forum in the present moment.

The management board is also appealed to contribute to the transparent decision-making procedures but the meaning of transparent decision-making is not legally revealed. The management board adopts yearly the detailed general report and the annual programme of work. These reports are available for the public and they serve as a point of the accountability because it is a public answer for the activities. In the same time, this manifestation of accountability does not guarantee any transparency in terms of quality of the given information, except of FRONTEX' promise to make information as reliable and accurate as possible.

In addition, the complaints mechanism represents a part of transparent working procedures of the agency. It could enable monitoring and control of the fundamental rights infringement in individual cases, increasing the agency's accountability and transparency, although the amendment of the Regulation in 2011 introduced the importance of this sort of monitoring without the specific legal obligation for the complaints. The individual (natural person) should have the possibility of the personal complaint, even in the case that he/she is non-EU. The European Ombudsman elaborated the recommended version of such a mechanism²⁷. The reinforcement of monitoring of fundamental rights violations is not coupled with the working system of expression of complaints, inconsistencies that are observed by the parties. The general independent monitoring is still in question.

Finally but importantly the website is taken into account as it is one of the essential sources of information. In the roadmap 2012²⁸ the requirements for the website of EU agency to make it multi-lingual to ensure the provision of the information necessary for transparency is indicated; the website should mention too that it's a European agency. FRONTEX mentions indeed that it is a European agency but concerning the language, it comes out that there is no multilingual version of the given information. The language regime plays a crucial role in giving the information and increasing transparency what was announced on political level²⁹. In the case of FRONTEX the publications are provided only in English language as well as the reports. It could be the obstacle to transparency and accountability of the organization. Article 28 of FRONTEX Regulation mentions the importance of the translation and ensures that in case of address to the Agency the answer will be

²⁶The list of organizations, participating in the consultative forum: Amnesty International European Institutions Office, Caritas Europa, Churches' Commission for Migrants in Europe, Council of Europe, European Asylum Support Office, European Council for Refugees and Exiles, European Union Agency for Fundamental Rights, International Catholic Migration Commission, International Commission of Jurists, International Organisation for Migration, Jesuit Refugee Service, OSCE Office for Democratic Institutions and Human Rights, Platform for International Cooperation on Undocumented Migrants, Red Cross EU Office, and the UNHCR.

²⁷ <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/60403/html.bookmark>.

²⁸ Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies (19 Jul. 2012).

²⁹ COM (2001) 428 European Governance. White Paper, Brussels - 25.07.2001.

in the same language (referred in article 214 of Treaty), but on the website there is no such a possibility and it impedes the process of the receipt of the information.

5.4. Conclusion

In this chapter, the transparency and accountability principles were applied to the FRONTEX organization. The section about the interaction with other EU institutions shows, that EP, Commission and the Council are involved into agency's activities, however, their participation is limited and has no significant influence on the final representation of the agency. MSs have more impact on the final decisions that are taken in FRONTEX, while the role of NGOs is more advisory than imposing compulsory actions. FRONTEX has a number of weaknesses in its representation as a transparent agency. Indeed, it is a hard task for this agency to act as openly as possible because of sensitive area of activities, yet it does not integrate the tools and mechanisms that seem rather safe in terms of threat to security (complaints mechanism, reports about implementation of evaluation recommendations etc). Notwithstanding, there are overarching challenges not only in the case of the concrete body but also in general, on the EU level as it was shown earlier. In the following chapter, there will be a short illustration of the FRONTEX work by means of an operation analysis.

6. Case of FRONTEX operation

The purpose of this chapter is to look through the lens of transparency and accountability at the activities of FRONTEX in practice on the example of operation.

6.1. Main Information on the operations

The agency's competence is to initiate independently Joint Operations (JO)³⁰. There are three types of the joint operation, defined by the sort of the border – sea, land and air. The risk analysis is a base for each JO. The operation are carried out not only within EU, but also outside the borders, in spite of arguable legal basis, because in such a case the agency acts on the “foreign” territory, which is not subject to EU law. In fact, the operations mostly concern third country nationals, who from the legal point of view are quite insecure in terms of the limited transparency and accountability, although just they are the real “victims”, or those on whom the operation finally has the impact. The organization should be responsible not only for the actions in relation to EU but also in relation to third countries that are involved.

6.2. Example of the operation at sea. TRITON Operation.

The Mediterranean is a problematic region, characterized by high migration pressure, where FRONTEX is harshly criticized for its activities. It is especially challenging to assess the operations at sea by reason of inaccessibility of a distant sea territory for different parties with the intention of an independent estimate. Mostly it may be assessed through separate media and NGO remarks, plus FRONTEX' reports which defines relatively independently the quality and quantity of published information. The situation at the sea in the Mediterranean is classified as tragedy because of multiple migrants' deaths that do not stop rising³¹. However, it is worth to know that FRONTEX does not originally lead “rescue” operations. On one hand, its powers are within control of the borders and fight with irregular migration issue. On another hand, the high effectiveness of these operations at sea remains doubtful and the agency promotes itself as protector of FR. In this section TRITON operation will be examined and the examination is limited to the transparency and accountability analysis. TRITON operation relates to the sea operations and it is subject to the recent Regulation No 656/2014, governing FRONTEX sea border surveillance operations³².

The aim of the border control operation TRITON, which was launched on 1 November 2014 and now extended till the end of 2015, is to control irregular migration flows and tackle cross-border crime. The

³⁰ article 3 FRONTEX Regulation 2011

³¹ http://europa.eu/rapid/press-release_IP-15-4813_en.htm.

³² Parliament and Council (2014), Regulation (EU) No 656/2014 of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex at the external borders of the Member States of the EU (Regulation on Frontex sea border surveillance operations), OJ L 189/93, 27 June.

humanitarian purpose is denied in spite of a bigger number of FR references in the amended Regulation 2011. The operation is highly criticized for not saving migrants' lives. Italy is a host country and Italian authorities bear the main responsibility for the operation. TRITON operation is organized to support Italy in its efforts but not to replace Italy's efforts. Unlike MS, FRONTEX does not bear full responsibility, according to the Regulation, though under the amended Regulation 2011 it may initiate and plan the operation. Regulation No 656/2014 makes precise, that FRONTEX is merely responsible for the "coordination of operational cooperation" between MSs as well as for "assisting" MSs ; rescue at sea may be involved (recital 4). The legal definition for "coordination" and "assistance" is not provided. Aside Italy and FRONTEX, the Italian Coast Guard, the naval forces and Guardia di Finanza take part in the operation. Triton takes place in the Central Mediterranean, active within 30 miles off the Italian coast. To launch the operation, FRONTEX addresses Member States and the Commission for funding³³. FRONTEX announced the main priority to save lives but in fact, it cannot be the main priority of the agency if it is not a rescue body. Amnesty International insists on the immediate safety of the migrants³⁴, pointing out the respect for FR.

During the operation, FRONTEX acts on behalf of Member States, but simultaneously the States only provide it with the necessary equipment and are not actively involved in the process of operation. The reports about the stages of the operation are not presented as risk analyses are not accessible for the public. The absence of such an information decreases trust to the agency and opportunities to monitor better FRONTEX' activities. The secrecy of the operational plan is maintained and this secrecy concerns not only TRITON operation but also other operations. The Commission provides funding, although it does not monitor the essential stages of the operation without the competence to define the final result of operation or make the agency have legal consequences for the infringement if they are. On the website of the agency news, relating to Triton, are presented as well as the brief description of the operation without precisions and details, concerning the roles of contributors, extent of their participation, control by them or absence of control. There is access to published communications, produced by EU institutions and by the Ombudsman, yet the nuances are not presented for the public, including those individuals, who are closely linked to the operation. The migrants, who obviously are the most interested party in the access to documents and general transparency and accountability of FRONTEX, get the least: no possibility to form the complaint, no possibility to read the website, which is not even in all the EU languages. The cooperation with third countries is considered crucial by Regulation No 656/2014 (recital 5), however, FRONTEX does not possess power to conclude international agreements, which could increase effectiveness of its activities. Concerning the fundamental right of access to documents (as explained above in the chapter 4), Regulation No 656/2014 passes it over in silence, in the same time it mentions "human dignity, the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, the prohibition of human trafficking in human beings, the right to liberty and security, the right to the protection of personal data, the right to asylum and to protection against removal and expulsion, the principle of non-refoulement and non-

³³ <http://frontex.europa.eu/news/frontex-launches-call-for-participation-of-the-eu-member-states-in-joint-operation-triton-b9nupQ>

³⁴ <https://www.amnesty.org/en/latest/news/2015/04/saving-lives-in-the-mediterranean-must-be-european-governments-priority/>.

discrimination, the right to an effective remedy and the rights of the child”(recital 19). The executive director is empowered to terminate the operation in the case of strong FR violations, notwithstanding, after the disclosure of the great number of deaths, the operation is not terminated; in contrast, its budget is planned to be even tripled, whereas FRONTEX refuses its duty of respect of FR in this concrete sort of operation. It comes out that FRONTEX makes the majority of steps in the operational activity without being responsible for it as in this case the responsibility is on Italy. It does not meet any legal consequences of such a “behavior”. FRONTEX does not respond in the obligatory way for its actions, meeting legal consequences for the wrong actions. The maximal threat for the agency in the case of the infringements is the critique from NGOs, for instance, or from the journalists.

6.3. Conclusion

The brief analysis of the operation shows, that it is problematic to estimate FRONTEX activities in terms of transparency and accountability, especially when it concerns the operations. The available information about the course of the operation is very limited; the details of the operations’ stages are missing. The basic accessible information relates to the main participants of the operation, to the budget which is spent for the operation, technical details, such as the use of technical equipment, but the monitoring of the operation cannot be executed appropriately in such conditions. The main monitoring functions are executed by the media and NGO, which produce reports, but it is insufficient if there is a goal to improve the common indicators of transparency and accountability.

7. Conclusion

The purpose of this study was to estimate, to what extent the EU agency FRONTEX is transparent and accountable for its activities. In chapter 3, the general meanings of the transparency and accountability concepts were scrutinized and these meanings were applied to the legal discourse. Chapter 4 provided the overview of the EU legal sources, which enshrine the principles of transparency and accountability. In chapter 5, the incorporation of the principles of transparency and accountability into FRONTEX activities was examined. Chapter 6 demonstrated the execution of both the principles in practical terms, i.e. during the operation.

The analysis elucidates that there is a great intention and many major changes of EU agency towards higher standards of transparency and accountability. However, there is much space for the further development and actions in this direction, particularly, from legal viewpoint. It is possible to claim that in the present moment FRONTEX is transparent and accountable if to build our conclusion on the base that transparency and accountability may be both measured only in terms “yes” or “no”. As explained above in Chapter 3, there is no clear system of indicators that would allow to estimate the degree of transparency and accountability in the concrete points. However, there is an opportunity to assess the availability of documents, the quality of the information (good or not good enough), to estimate if the decision-making process is transparent or non-transparent, to estimate if the organization is obliged to give the response or not. Indeed, the evolvement of the organization demonstrates better understanding of significance of open manner of work, especially dealing with sensitive issues, concerning the violation of fundamental rights. The development of fundamental rights’ framework in the legal basis of the agency enables certainly a higher degree of transparency and accountability because the independent parties are attracted to the process of the work of the agency. At the same time, the legal progress is very slow; there is no efficient legal tools to execute independent control and monitoring. The agency is often not pro-active in the introduction of open manner of work at all the levels and there is no strong intention of FRONTEX to provide the widest possible access to documents, which is promised by Regulation No 1049/2001/EC. FRONTEX does not elaborate the mechanisms that would increase its transparency; it does so only in the case of pressure on the agency. FRONTEX could implement the recommendations and the advices given by different parties (NGO, Ombudsman, EU institutions) as soon as possible for it. The principles of transparency and accountability are closely linked to the efficient administration in general; the active application of these principles is fruitful not only for EU administration. Thus even if the agency is an independent body to much extent, it does not mean that this body should not be interested in the transparent working. To prevent the harsh critique, EU also may develop further the legal framework of transparency and accountability by creating concrete definitions and criteria for the notations, which are still very loose. The agency is not expected to become an ideal transparent organization nor it is responsible to boost FR and new governance values, but it is highly desirable that it improves its standards and pushes other EU agencies to better accountability and transparency, because these discrepancies partly concern them too.

8. References

Scientific sources

- Adamski, D. (2014). "Access to Documents, Accountability and the Rule of Law—Do Private Watchdogs Matter?" *European Law Journal*, 20, pp. 520–543.
- Arcarazo, D. A., & Murphy, C. C. (Eds.). (2014). *EU Security and Justice Law: After Lisbon and Stockholm*. Bloomsbury Publishing.
- Babbie, E. (2007). *The Practice of Social Research* (12 ed.): Wadsworth, Cengage Learning.
- Bovens, M. (2007). "Analysing and assessing accountability: a conceptual framework", *European Law Journal* 13(4), pp. 447–68.
- Busuioc, M. (2009). "Accountability, Control, and Independence: The Case of European Agencies". *European Law Journal*, 15(5), pp. 599–615.
- Busuioc, M. (2010). *The Accountability of European Agencies: legal provisions and ongoing practices*. The Netherlands.
- Busuoic, M. (2012). "European agencies and their boards: promises and pitfalls of accountability beyond design". *Journal of European Public Policy*, 19(5).
- Busuioc, M., Curtin, D. and Groenleer, M. (2011a). "Agency growth between autonomy and accountability: the European Police Office as a "living institution"." *Journal of European Public Policy* 18(6).
- Carrera, S., den Hertog, L., & Parkin, J. (2013). "The peculiar nature of EU Home Affairs agencies in migration control: beyond accountability versus autonomy?" *European Journal of Migration and Law*, 15(4), pp. 337-358.
- Carrera, S., & den Hertog, L. (2015). "Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean". CEPS Liberty and Security in Europe No. 79/January 2015.
- Chalmers, D., Davies, G., & Monti, G. (2010). "*European Union Law*" (second edition). Cambridge: Cambridge University Press.
- Cucciniello, M., Nasi, G., Valotti, G. (2012). "Assessing Transparency in Government: Rhetoric, Reality and Desire." Published in: *System Science (HICSS)*, pp.2451-2461.

- Curtin, D. (2014). "Overseeing Secrets in the EU: A Democratic Perspective". *JCMS: Journal of Common Market Studies*, 52, pp. 684–700.
- Forssbæk, J. & Oxelheim, L. (2014). "The Multi-Faceted Concept of Transparency." *IFN Working Paper No. 1013*.
- Fox, J. (2007). "The Uncertain Relationship between Transparency and Accountability". *Development in Practice*, 17(4), pp. 663–71.
- Hollyer, R. James, B. Peter Rosendorff and James R. Vreelend (2014). "Measuring Transparency." *Political Analysis*.
- Leonard, S. (2009). "The creation of FRONTEX and the politics of institutionalisation in the EU external borders policy". *Journal of contemporary European research*, 5(3), pp. 371-388.
- Marin, L. (2011). "Policing the EU's External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Borders". *Journal of Contemporary European Research*, 7(4), pp. 468-487.
- Meijer, A. (2013). 'Understanding the Complex Dynamics of Transparency'. *Public Administration Review* 73(3), pp. 429-439.
- Pandit, N. (2012). "Policing the EU's external border: legitimacy and accountability under scrutiny." *ERA Forum* 13(3), pp. 397-410.
- Parkes, R. (2013a). "Frontex: an Accountability Problem", *Polish Institute of International Affairs (PISM) Bulletin* 144.
- Paskouau, Y., Schumacher P. (2014). "Frontex and the respect of fundamental rights: from better protection to full responsibility." Policy Brief, European Policy Centre.
- Perkowski, N. (2012). "A normative assessment of the aims and practices of the European border management agency Frontex", Oxford Refugee Studies Centre Working Paper Series No. 81, Oxford: Oxford Refugee Studies Centre.
- Pollak, J., Slominski, P. (2009). "Experimentalist but not Accountable Governance? The Role of FRONTEX in Managing the EU's External Borders". *West European Politics*, 32(5), pp. 904- 924.
- Rijpma, J. (2010). "FRONTEX: successful blame shifting of the Member States?" ARI 69/2010, Real Instituto Elcano, 13 April 2010.

Schnackenberg, A. (2009). "Measuring Transparency: Towards a Greater Understanding of Systemic Transparency and Accountability".

Scholten, M. (2011). Independent, hence unaccountable? The need for a broader debate on accountability of the executive Union. *Review of Administrative Law*, 4(1), pp. 5-44.

Stiglitz, J. E. (1999). "On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life", *Oxford Amnesty Lecture, Oxford, U.K., January 27*.

Statewatch. (2012). Analysis Criticism of Frontex's operations at sea mounts. from <http://www.statewatch.org/analyses/200-frontex-search-rescue.pdf>

Trauner, F. (2012). "The European Parliament and Agency Control in the Area of Freedom, Security and Justice". *West European Politics*, 35(4), pp. 784-802.

Vara, J. S. (2015). The External Activities of AFSJ Agencies: The Weakness of Democratic and Judicial Controls. *European Foreign Affairs Review*, 20(1), pp. 118-136.

Wolff, S., & Schout, A. (2013). "Frontex as Agency: More of the Same?" *Perspectives on European Politics and Society*, 14(3), pp. 305-324.

Internet Sources

<https://www.amnesty.org>.

http://ec.europa.eu/transparency/index_en.htm

<http://www.ecre.org>.

<http://www.europarl.europa.eu/>.

<http://www.frontex.europa.eu>.

<http://www.frontexit.org/en/docs/>

<http://www.hrw.org>.

<https://www.statewatch.org>.

<http://www.unhcr.org>.

<http://www.ombudsman.europa.eu/en/>

www.thelawdictionary.org law dictionary

Official documents

Charter of Fundamental Rights of the European Union (2000/C 364/01). Brussels: European Union. OJ (364/1), 18.12.2000. Retrieved from http://www.europarl.europa.eu/charter/pdf/text_en.pdf

Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (O.J. L 349, 25.11.2004).

COM (2001) 428 European Governance. White Paper, Brussels, 25.07.2001.

Consolidated Version of the Treaty on the Functioning of the European Union. Brussels: European Union. OJ (C115/47), 09.05.2008

Council. (2004). *Council Regulation (EC) No 2007/2004 establishing Frontex*.

European Parliament & EU Council. (2011). *Regulation (EU) No 1168/2011 amending Council Regulation (EC) No 2007/2004*.

European Commission. European Governance. White Paper, Brussels, 25.07.2001. COM (2001) 428.

European Commission. European Transparency Initiative. Green Paper, Brussels – 03.05.2006. COM (2006) 194.

Human Rights Watch. (2011). *The EU's Dirty Hands – Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*. Retrieved from http://www.hrw.org/sites/default/files/reports/greece0911webwcover_0.pdf

Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies (19 Jul. 2012).

Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 189/93, 27.06.2014).

Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L145/43, 31.5.2001).

Regulation (EU) No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of the Operational Cooperation at the External Borders of the Member States of the European Union. Brussels: European Union. (OJ L 304/1, 25.10.2011).

